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No. 07-1305

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

CITY AND COUNTY OF HONOLULU,
a municipal corporation of the State of Hawai'i,

Petitioner,

vs.

SALLY A. MATSUDA, Trustee of the Sally A. Matsuda Self-Trusteed Trust dated October 15, 1993, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

Of Counsel:
ALSTON HUNT FLOYD & ING
Attorneys at Law
A Law Corporation

DAVID A. NAKASHIMA
Counsel of Record
CLYDE J. WADSWORTH
LERISA L. HEROLDT
American Savings Bank Tower
1001 Bishop Street, 18th Floor
Honolulu, Hawai'i 96813
Telephone: (808) 524-1800
Facsimile: (808) 524-4591

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Ninth Circuit's Opinion concluded that the District Court failed to follow this Court's decision in *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977).

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the Ninth Circuit refused to apply the reserved powers doctrine to Respondents' contracts with Petitioner.

LIST OF PARTIES

The Petitioner is the City and County of Honolulu ("Petitioner").

The Respondents are SALLY A. MATSUDA, Trustee of the Sally A. Matsuda Self-Trusteed Trust dated October 15, 1993; RALPH JAMES MITCHELL; LUCY ELIZABETH MITCHELL; NOOSHA BIRGITTA FESHARAKI; EARL LEWIS KIDDER; JEENIE MARIE KIDDER; JAMES THOMAS RAPISARDA; JONATHAN VON BRANA; THOMAS LEONARD PRESTON; LOREN HERBERT HOHMAN, II; HERBERT CAPLAN, Co-Trustee of the Herbert Caplan and Elena V. Pecile Trust dated March 27, 2003; ELENA VIRGINIA PECILE, Co-Trustee of the Herbert Caplan and Elena V. Pecile Trust dated March 27, 2003; WILMA I. PARKER, Trustee of the Wilma I. Parker Trust dated March 16, 1989, as amended; TROY FONTAINE WILLIAMS; LARRY WEISNER; DELORES WEISNER; RICHARD JOSEPH JAEGER, III; MARIANNE MARION JAEGER; RICHARD ERLAND JOHNSON; WILLIAM GARRETT FUSON, JR.; KANG YUK LEE; SUK JA LEE; CLAUDE R. ROTHE, Trustee of the Claude R. Rothe Living Trust dated March 26, 1998; ALVIN R. OLSON, Trustee under Alvin R. Olson Revocable Trust Agreement dated July 20, 1998; NATALIA INDRASARI; WARREN M. SWEET, Trustee of the Sweet Joint Revocable Trust dated June 21, 1991; RHEBA ALICE SWEET, Trustee of the Sweet Joint Revocable Trust

LIST OF PARTIES – Continued

dated June 21, 1991; ROBERT JOSEPH MEHRING; AYUMI WATANABE MEHRING; ARNOLD THEODORE FLEMMINGS, Co-Trustee of the Arnold Theodore Flemmings and Mariana Flemmings Revocable Living Trust dated December 6, 1999; MARIANA FLEMMINGS, Co-Trustee of the Arnold Theodore Flemmings and Mariana Flemmings Revocable Living Trust dated December 6, 1999; MELVIN TAKEO MATSUOKA; DELWIN BYRON SCHNEIDER, Trustee under the Delwin Byron Schneider and Katherine Louise Schneider Family Trust dated October 14, 1996; KATHERINE LOUISE SCHNEIDER, Trustee under the Delwin Byron Schneider and Katherine Louise Schneider Family Trust dated October 14, 1996; RONALD DEAN SILVERMAN; FARHAD F. SIMYAR; SOUSSAN SIMYAR; and FRANK WINSTON KERN ("Respondents").

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") is reported at 512 F.3d 1148, and is set forth in Petitioner's Appendix ("Pet. App.") at pp. 1a-19a. The Opinion of the United States District Court for the District of Hawaii ("District Court"), which was reviewed by the Ninth Circuit, is reported at 378 F. Supp. 2d 1249, and is set forth in Pet. App., at pp. 35a-52a.

JURISDICTION

The Ninth Circuit's *Opinion* and *Judgment* were entered on January 14, 2008 ("Ninth Circuit's Opinion"). *See* Pet. App., at pp. 2a, 21a. The *Petition for a Writ of Certiorari* was filed on April 14, 2008 ("Petition"). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution's Contract Clause provides that "[n]o State shall . . . pass any . . . Law

impairing the Obligation of Contracts." U.S. CONST. art. I, § 10.[1]

ORDINANCES INVOLVED

This case involves the following City and County of Honolulu ordinances: (1) Ordinance 91-95, which was enacted in 1991 and later codified at Chapter 38 of the Revised Ordinances of Honolulu ("Chapter 38"); and (2) Ordinance 05-001, effective as of February 9, 2005, and repealing Chapter 38.[2] The original version of Ordinance 91-95 is set forth in Pet. App., at pp. 53a-93a. Chapter 38 is set forth in Pet. App., at pp. 94a-129a. Ordinance 05-001 is set forth in Pet. App., at pp. 130a-135a.

INTRODUCTION

Petitioner has presented no "compelling reasons" for its Petition to be granted. *See* Supreme Court Rule ("Sup. Ct. R.") 10. Specifically, Petitioner fails to

[1] In addition to their Contract Clause claim, Respondents sought relief for Petitioner's violations of the United States Constitution's Fourteenth Amendment's Due Process Clause (substantive component), U.S. CONST. amend. XIV, § 1, and Bills of Attainder Clause, U.S. CONST. art I., § 10. Those issues were not addressed by the District Court or the Ninth Circuit.

[2] Respondents also sought relief under 42 U.S.C. § 1983, but that issue was not addressed by the District Court or the Ninth Circuit.

demonstrate that the Ninth Circuit's Opinion is in conflict with a decision of this Court or another Court of Appeals, or that the Ninth Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). In fact, Petitioner has not even carried its significantly less strenuous burden of showing that the District Court correctly applied the relevant substantive law when it granted Petitioner summary judgment – which would, in any event, constitute insufficient grounds to grant the Petition. *See id.*

This action arises out of Petitioner's enactment and enforcement of Ordinance 05-001, which repealed the statutory mechanism allowing owners of leasehold interests in condominium units such as Respondents to convert their leasehold interests into fee interests by using Petitioner's eminent domain power.[3] *See* Chapter 38, set forth in Pet. App., at pp. 94a-129a.[4] Respondents each hold legal title to their respective residential condominium apartments in

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[3] The Hawaii legislature has delegated the power of eminent domain to local bodies such as Petitioner. Hawaii Revised Statutes ("Haw. Rev. Stat.") § 46-1.5(6) (1993).

[4] The history, purpose and constitutionality of Chapter 38 were thoroughly examined (and upheld) by the Ninth Circuit in *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1995), *cert. denied*, *City and County of Honolulu v. Small Landowners of Oahu*, 525 U.S. 871 (1998), *Small Landowners of Oahu v. City and County of Honolulu*, 525 U.S. 921 (1998), *Hawaii Leaseholders Equity Coalition v. Small Landowners of Oahu*, 525 U.S. 1018 (1998).

the complex known as "Discovery Bay." Pursuant to Chapter 38, each of the Respondents entered into a written Leased Fee Interest Purchase Contract (collectively, the "Contracts") with Petitioner, which agreed to convey to each Respondent his or her respective leased fee interest in Discovery Bay.[5]

Despite the fact that (1) Respondents fulfilled every condition and requirement imposed by Chapter 38; (2) Petitioner determined the acquisition of the leased fee interests at Discovery Bay effectuated the public purpose of Chapter 38; and (3) the parties entered into "legally binding contract[s]" as described by Petitioner, Petitioner nevertheless passed Ordinance 05-001 repealing Chapter 38 and purposefully excluded Respondents from a savings clause that would have allowed them to complete their purchase. By this new law, Petitioner then repudiated the Contracts. If this kind of unconscionable governmental action does not constitute a violation of the Contract Clause, it is difficult to imagine what does. By repealing Chapter 38 in such a way as to extinguish Respondents' contractual rights, Petitioner substantially impaired Respondents' Contracts in violation of the United States Constitution.

The Ninth Circuit held that the heightened scrutiny test established by this Court in *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1

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[5] The individual Contracts between Petitioner and each Respondent are in the same format as that set forth in Pet. App., at pp. 136a-151a.

(1977) provides the "mandatory analysis" for Respondents' Contract Clause claims. Pet. App., at p. 14a. It vacated the District Court's grant of summary judgment in Petitioner's favor and remanded to allow the District Court to consider Respondents' Contract Clause claims "under the framework set forth in *U.S. Trust*." Pet. App., at p. 16a. The Ninth Circuit's Opinion is consistent with this Court's and the Court of Appeals' decisions on the Contract Clause, indeed, the pertinent standard of review was settled by this Court over thirty years ago.

The Petition is striking in two important respects. First, Petitioner erroneously claims that *U.S. Trust's* heightened scrutiny test governing the impairment of public contracts does not apply to Respondents' Contract Clause claims. This test, first articulated by this Court in *U.S. Trust*, has since been applied in a long line of cases involving the impairment of public contracts. Under this test, when legislative action impairs the government's own contracts, the government must demonstrate that the impairment is both reasonable and necessary to serve an important public purpose. But rather than hold itself to the requisite constitutional standard, Petitioner brushes aside this Contract Clause analysis with the unsupported assertion that the common law "reserved powers" doctrine trumps this established constitutional test. Indeed, Petitioner's central argument is that the Ninth Circuit failed to substitute and apply the reserved powers doctrine to absolve

Petitioner from its contractual obligations and to eviscerate Respondents' constitutional rights.

Taken to their logical extreme, Petitioner's arguments would give it unfettered discretion to repudiate its own contracts under the guise of its police and eminent domain powers. This grant of judicial immunity directly conflicts with this Court's ruling in *U.S. Trust* and *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). In a public contract case such as this, even when the exercise of the police or eminent domain power is at issue, the heightened scrutiny test must be applied. The second prong of the test – the requirement of a legitimate and important public purpose – guarantees that the State is exercising its police or eminent domain power, rather than benefitting special interests.

Second, the Petition posits such an expansive view of the reserved powers doctrine that the result would not only eviscerate *U.S. Trust* and its progeny, but would confer upon Petitioner total and absolute legislative discretion to do what it pleases under the guise of its eminent domain and police powers. In advancing this unprecedented theory of legislative power, Petitioner essentially writes the constitutional Contract Clause and related judicial decisions out of existence. Moreover, Petitioner makes sweeping statements of its legislative prerogative that ring not

only without authority, but with positively (indeed, Orwellian) authoritarian overtones.[6]

These anti-constitutional pronouncements are clearly not the law. Testing the government's legislative purpose is *precisely* the Court's duty in adjudicating a constitutional challenge such as this – a duty that it is compelled to perform under the *U.S. Trust* line of cases. Taken on their face, Petitioner's blanket statements of legislative power would allow it to use its police and eminent domain powers to punish or otherwise discriminate against its political opponents or other minority – all without judicial scrutiny. That may or may not be what Petitioner intended here, but it underscores the fact that there are obvious constitutional limits on Petitioner's police and eminent domain powers, and the constraints of the Contract Clause, like those of the Due Process (or for that matter, the Equal Protection) Clause, cannot simply be brushed aside by blanket reliance on the common law "reserved powers" doctrine. That is all Petitioner offers in the Petition. Accordingly, the Petitioner should be denied.

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[6] Thus, Petitioner declares broadly that "[t]he courts must defer to the legislative branch when faced with issues of public purpose and eminent domain" and "[t]his Court must not question the City Council's finding of an absence of public purpose." Petition, at pp. 28, 30.

STATEMENT OF THE CASE

Chapter 38 was a response to Hawaii's long history of feudal land ownership, which survived well after American acquisition. *See Richardson*, 124 F.3d at 1153. At the time of Chapter 38's enactment, a small handful of landowners owned the vast majority of land in the State. Despite the efforts of Hawaii's leaders to divide these large Hawaiian land estates, the system persisted, driving the price of land in Hawaii to exorbitant heights. Hawaiian landowners rarely sold their estates. Instead, they frequently leased their land for long terms, often to developers who would construct condominiums on the property and then sell the units subject to the ground lease. *Id.* at 1153-54.

To break up this pattern and to increase the opportunity for landownership, Petitioner enacted Chapter 38. *See* Ordinance 91-95, § 1, set forth in Petitioner's App., at pp. 53a-58a. Chapter 38 provided that when a sufficient number of condominium unit owners within a condominium complex applied, Petitioner would take steps to acquire the property on which their condominium complex was built from the landowner by power of eminent domain. Petitioner would then convey each condominium unit and the appurtenant land to the lessee-applicants in fee simple. *See* Chapter 38, set forth in Pet. App., at pp. 95a, 104a-111a,124a-128a.

Specifically, Chapter 38 required an application from a minimum of either 25 condominium owners within a development of the owners of at least 50% of the condominium units within the development to trigger its condemnation mechanism. Revised Ordinances of Honolulu ("R.O.H.") § 38-2.2(a)(1), set forth in Pet. App., at p. 105a. Upon such application, Petitioner's Department of Community Services, fka Department of Housing and Community Development (the "Department"), would hold a duly-noticed public hearing to determine whether the acquisition of the leased interests through eminent domain would "effectuate public purposes" as defined in Chapter 38. R.O.H. § 38-2.2(a)(2), set forth in Pet. App., at pp. 105a-106a. If the Department issued a finding answering that question in the affirmative, the Department would designate the leased interests for acquisition through the power of eminent domain. Pet. App., at pp. 105a-106a. The Department's designation entitled applicants to a resolution adopted by the Honolulu City Council (the "Council") authorizing Petitioner's attorneys to initiate an eminent domain proceeding on the applicants' behalf. R.O.H. § 38-5.2, set forth in Pet. App., at p. 125a. *See also* Rules of Residential Condominium, Cooperative and Planned Development Leasehold Conversion (2000) (the "Rules"), § 2-12 set forth in Respondents' Appendix ("Resp. App.") 1, at p. App. 3.[7]

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[7] Petitioner mischaracterizes the nature, import and effect of the resolution intended by Rules § 2-12. Petitioner concludes

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Respondents hold leasehold interests in condominium units at the Discovery Bay condominium

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without any support that "[t]he adoption of a condemnation resolution for leasehold conversion by the City Council would establish that the condemnation of the leased fee interest of the subject property by [Petitioner's] exercise of its power of eminent domain was necessary for the public purpose and use as declared in Ordinance 91-95 and the purpose stated in Chapter 38." Petition, at 7. Petitioner is mistaken. Pursuant to Chapter 38's express language, the Department – not the Council – had the authority to: (1) determine whether the proposed condemnation would effectuate the public purpose of Chapter 38; and (2) designate the applicable property for acquisition by Petitioner through the exercise of its eminent domain power. R.O.H. § 38-2.2, set forth in Pet. App., at pp. 105a-106a. By the time the resolution required by Rules § 2-12 would be presented to the Council, the Department had already determined that the applicants had complied with all of Chapter 38's requirements and it had designated the applicable property for acquisition. R.O.H. §§ 38-2.2, 38-5.2, set forth in Pet. App., at pp. 105a-106a, 125a; Rules § 2-12, set forth in Resp. App. 1, at p. App. 3. Contrary to Petitioner's suggestion, the resolution requirement is simply intended to comply with other statutes and ordinances setting forth the procedure for Petitioner's exercise of its eminent domain powers. *See* Hawaii Revised Statutes §§ 101-13, 101-14 (1993), set forth in Resp. App. 2, at pp. App. 6-App. 7; R.O.H. § 2-3.2, set forth in Resp. App. 3, at p. App. 8. Indeed, Chapter 38 did not confer any authority on the Council with respect to the Chapter 38 process. *See* Chapter 38, set forth in Pet. App., at pp. 94a-129a. Accordingly, the Council's adoption of the resolution required by Rules § 2-12 was an administrative, ministerial act rather than a legislative one. *See Kaahumanu et al. v. County of Maui et al.*, 315 F.3d 1215, 1221-24 (9th Cir. 2003). It did not require the formulation of policy nor did it create a binding rule of conduct. Rather, in adopting such resolutions, the Council simply carried out, and did not change, the policies embodied in Chapter 38. *Id.*

complex in Honolulu, Hawaii. Pet. App., at pp. 5a, 25a, 36a. Respondents applied to Petitioner under Chapter 38 to convert their leasehold interests into fee simple interests in their units and the appurtenant land. *Id.* at pp. 5a-6a, 25a-26a, 36a-37a. Upon receipt of Respondents' applications, Petitioner entered into individual written contracts with each Respondent in which the Respondent promised to pay Petitioner $1000 in exchange for Petitioner's promise that, upon its successful acquisition of the leasehold interests at Discovery Bay, Petitioner would convey a fee interest to each Respondent in his or her unit and the appurtenant land. *Id.* Each contract was expressly conditioned on Petitioner's successful acquisition of the property pursuant to Chapter 38, and each party agreed to use its best efforts to effectuate the acquisition. *Id.* at p. 6a.

On August 3, 2004, after a duly-noticed public hearing, the Department announced its finding that condemnation of leased fee interests at Discovery Bay would effectuate the public purpose required by Chapter 38. *Id.* at pp. 6a, 26a, 37a.[8] A few months later, Respondents received written notice of their final approval to proceed with Chapter 38's leasehold conversion procedure. *Id.* at p. 6a. On November 4, 2004, the Department designated Respondents' leasehold interests in the real property and other

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[8] The Ninth Circuit's Opinion mistakenly states that the Department announced its finding of public purpose of July 3, 2004, instead of August 3, 2004.

common elements at Discovery Bay for acquisition through Petitioner's exercise of eminent domain, finding that Respondents had satisfied Chapter 38's numerosity requirement, that the condemnation would effectuate Chapter 38's public purpose, and that no agreement for a voluntary sale by the landowner had been made. *Id.* at pp. 6a, 26a, 37a.[9] On November 10, 2004, a Council member introduced a resolution to the Council, which sought the Council's approval to initiate an eminent domain proceeding on Respondents' behalf. *Id.* at pp. 7a, 30a, 41a.

However, as Respondents' applications were progressing, the Council began considering Bill 53, which would repeal Chapter 38. *Id.* at pp. 6a-7a, 26a-29a, 37a-40a. Thus, even though Respondents had met all the requirements of Chapter 38, the Council deferred consideration of the resolution pending the possible repeal of Chapter 38. *Id.* at pp. 7a, 30a, 41a.

On January 26, 2005, the Council enacted Ordinance 05-001, repealing Chapter 38. *Id.* at p. 7a. Ordinance 05-001 permitted any condemnation proceeding approved by Council resolution before the effective date of the repeal to continue, but because the Council never took such a step to approve the condemnation of the property at Discovery Bay,

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[9] The Ninth Circuit's Opinion and the District Court's orders mistakenly state that the Department designated Respondents' leasehold interests in Discovery Bay for acquisition through Petitioner's exercise of eminent domain on November 24, 2004, instead of November 4, 2004.

Respondents' efforts failed. *Id.* at pp. 7a, 30a, 41a-42a.

Respondents filed suit against Petitioner in the District Court, arguing that Ordinance 05-001 violated the Contract Clause, the Fourteenth Amendment's Due Process Clause, and 42 U.S.C. § 1983. *Id.* at pp. 7a, 31a, 42a. Shortly thereafter, Respondents moved for a preliminary injunction to enjoin the implementation of Ordinance 05-001, which the District Court denied. *Id.* Respondents then filed a motion for summary judgment, which the district court denied as well, granting summary judgment in favor of Petitioner instead. *Id.* at pp. 7a-8a, 31a-32a, 42a-43a. The District Court concluded that Respondents could not challenge Ordinance 05-001 under the Contract Clause because Respondents' Contracts with Petitioner were unenforceable. *Id.* at pp. 8a, 32a-34a, 45a-52a. It reasoned that the "reserved powers" doctrine precluded Petitioner from entering to the Contracts because they purported to limit Petitioner's power, a power which has been labeled as an "essential attribute of sovereignty." *Id.*

The Ninth Circuit disagreed with the District Court, held that *U.S. Trust's* heightened scrutiny test provides the mandatory analysis for Respondents' Contract Clause claims, vacated the District Court's grant of summary judgment in Petitioner's favor and remanded the case to allow the district court to consider Respondents' Contract Clause claims under the framework set forth in *U.S. Trust*. *Id.* at pp. 13a-14a, 16a, 19a.

REASONS FOR DENYING THE PETITION

The Ninth Circuit's Opinion is correct. It does not conflict with a decision of this Court or any Court of Appeals nor does it implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not carried its burden of demonstrating that any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. The Ninth Circuit's Holding That *U.S. Trust* Provides the Appropriate Standard of Review Is Consistent With This Court's Decisions on the Contract Clause

The Ninth Circuit correctly held that "*U.S. Trust's* heightened scrutiny test provides the mandatory analysis" for Respondents' Contract Clause claims. Ninth Circuit's Opinion, set forth in Pet. App., at 14a. In *U.S. Trust*, the Court recognized that the Contract Clause imposes important limits on the power of the state to modify its own contracts, as well as to regulate those between private parties, even in the exercise of the police power. *U.S. Trust*, 431 U.S. at 17, 22, 26. *See Allied Structural Steel Co.*, 438 U.S. at 242. Despite the customary deference courts give to state laws directed to social and economic problems, "[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *U.S. Trust*, 431 U.S. at 22. Analyzing the modification of a contract to which the State itself was a party, the Court

held that legislative alteration of the rights and remedies of Port Authority bondholders violated the Contract Clause because the legislation was neither *reasonable* nor *necessary* to serve an important public purpose. *Id.* at 29-31. In applying this standard to a public contract, the Court made clear that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *Id.* at 26. Simply because its view of the public interest might change, the State could not renege on its statutory promise not to reduce reserves pledged as security for Port Authority bonds. *Id.*

In the three decades since *U.S. Trust* was decided, the heightened scrutiny test has been repeatedly applied to Contract Clause claims involving public contracts. *See, e.g., Energy Reserves Group, Inc. v. The Kansas Power and Light Co.*, 459 U.S. 400 (1983); *So. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 890 (9th Cir. 2003); *Univ. of Hawaii Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999). The test is a three-part inquiry that considers whether: (1) state law has, in fact, operated as a substantial impairment of a contractual relationship; (2) a significant and legitimate public purpose is served by the law; and (3) the impairment caused by the law is both reasonable and necessary to support an important public purpose.[10] *U.S. Trust*, 431 U.S. at

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[10] This test is contrasted with the low-level scrutiny test applicable to private contracts set forth in *Energy Reserves*, 459

(Continued on following page)

17, 22-23, 25-26, 29. *Accord Energy Reserves*, 459 U.S. at 411-12; *Rui One Corp. v. City of Berkeley*, 371 F.3d 1137, 1147 (9th Cir. 2004); *So. California Gas*, 336 F.3d at 889-890, 894; *Cayetano*, 183 F.3d at 1101-02, 1106.

Thus, when Petitioner impairs its own contracts, it must meet a high burden of justification. At the very least, it must show the "necessity" of the impairment. *U.S. Trust*, 431 U.S. at 29. Petitioner's self-serving or even utilitarian calculation of public benefit versus individual loss will not suffice: "a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors." *U.S. Trust*, 431 U.S. at 29.

Here, Petitioner completely ignores *U.S. Trust's* heightened scrutiny public contract test and simply asserts, without authority, that Petitioner's regulatory and eminent domain powers cannot be limited by contract. Petition, at pp. 20-33. Indeed, it fails to impose any burden of justification on itself, much

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U.S. at 411-12. The low-level scrutiny test considers whether: (1) the state law has, in fact, operated as a substantial impairment of a contractual relationship; (2) a significant and legitimate public purpose is served by the regulation; and (3) the impairment caused by the law is based on reasonable conditions and is of a character appropriate to the public purpose i.e., whether the law is a reasonable and *appropriate* means to the ends. *Energy Reserves*, 459 U.S. at 411-12 (internal quotation marks, brackets and citation omitted).

less the burden of necessity. Despite this Court's admonition that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate" where the government's self-interest is at stake, 431 U.S. at 26, Petitioner asks the Court to do exactly that. Petition, at pp. 28-30.

Petitioner's dismissal of the *U.S. Trust* test directly conflicts with the appropriate Court precedent. The result is to render the Contract Clause meaningless and grant Petitioner absolute legislative discretion to do what it pleases under the guise of its eminent domain and police powers. This is exactly what the Court has warned against:

> [T]he Contract Clause remains part of the Constitution. It is not a dead letter. . . . If the Contract Clause is to retain any meaning at all, however, it must be understood to impose *some* limits upon the power of the State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police powers.

Allied Steel, 438 U.S. at 241-42 (emphasis in original).

Indeed, the District Court's refusal to apply the heightened scrutiny public contract test set forth in *U.S. Trust*, 431 U.S. at 17, 22-23, 25-26, 29 constituted reversible error, and the Ninth Circuit correctly vacated the District Court's grant of summary judgment in Petitioner's favor. *See United States v. Virginia et al.*, 518 U.S. 515, 555 (1996) (appellate court

committed plain and reversible error when it refused to apply heightened standard of review established by Court precedent, and instead devised another test using a lower standard of review and proceeded to find the new test satisfied).

II. The Ninth Circuit's Refusal to Apply the Reserved Powers Doctrine Does Not Conflict With This Courts' Decisions

The Ninth Circuit's refusal to apply the reserved powers doctrine to preclude Respondents' Contract Clause claims was correct. Ninth Circuit's Opinion, set forth in Pet. App., at pp. 9a-14a. The reserved powers doctrine prevents a sovereign from contracting away or surrendering only a narrow category of substantive governmental powers that are essential attributes of sovereignty. *See United States v. Winstar Corp.*, 518 U.S. 839, 874 (1996); *U.S. Trust*, 431 U.S. at 23-25. The doctrine – a common law creation – is *not* an exception to, or substitution for, Contract Clause analysis under *U.S. Trust* and its progeny. *See Rui One*, 371 F.3d at 1147, 1150 (applying three-step inquiry to municipal ordinance enacted under broad police power to regulate wages and employment conditions); *So. California Gas*, 336 F.3d at 893 ("Santa Ana cannot avoid Contract Clause analysis merely by establishing that the trench cut ordinance is an otherwise legitimate exercise of police power"); *Cayetano*, 183 F.3d at 1107 (reviewing pay-lag statute, "we balance 'the contractual rights of the individual against the essential attributes of sovereign

power necessarily reserved by the States to safeguard the welfare of their citizens' ") (quoting *Ass'n of Surrogates & Supreme Court Reporters v. State*, 940 F.2d 766 (2d Cir. 1991)); *Garris v. Hanover Ins. Co.*, 630 F.2d 1001, 1005 (4th Cir. 1980) (*U.S. Trust* and *Allied Steel* "simply refine and update the traditional balancing test between reserved state police power and private contractual obligations that has always been required in Contract Clause analysis"). The doctrine does not remove the government's exercise of the police or eminent domain powers from judicial scrutiny. Thus, in a public contract case, even when the exercise of the police or eminent domain powers are at issue, the heightened scrutiny test must still be applied. *See, e.g., Rui One*, 371 F.3d at 1147; *So. California Gas*, 336 F.3d at 893; *Cayetano*, 183 F.3d at 1107. Indeed, the second part of the *U.S. Trust* analysis tests the legitimacy and significance of the asserted public purpose. *See Energy Reserves*, 459 U.S. at 12 ("[t]he requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests"); *Rui One*, 371 F.3d at 1147.

Moreover, while the Contract Clause does not require a state to adhere to a contract "that surrenders an essential attribute of its sovereignty," the reserved powers doctrine does not permit Petitioner to retrospectively revoke vested contractual rights – such as those held by Respondents under the Contracts – in violation of the Contract Clause. *U.S. Trust*, 431 U.S. at 23-25; *Coombes v. Getz*, 285 U.S.

434 (1931) (obligations of contract may not be impaired by the state in exercise of authority under reserved powers).[11] *See Energy Reserves*, 459 U.S. at 412, n.14 ("[w]hen a State itself enters into a contract, it cannot simply walk away from its financial obligations"); *So. California Gas*, 336 F.3d at 893 ("[w]e cannot read the [public contract] in a way that reserves to Santa Ana the power to unilaterally alter the terms of the agreement"). A reserved powers doctrine that purports to give a State the power "'to deny or change the effect of [a] promise, is an absurdity.'" *U.S. Trust*, 431 U.S. at 25, n.23 (quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1878)). *See also Cont'l Illinois Nat'l Bank v. Washington*, 696 F.2d 692, 698

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[11] In *Coombes*, the petitioner brought suit against a corporate director to recover the debt owed for goods sold to the corporation. A state constitutional provision that provided the basis for the director's contractual liability was repealed while petitioner's suit was on appeal. The respondent argued that the petitioner's right to enforce the liability provision fell with the repeal since it was dependent on the repealed provision and had not been perfected by final judgment.

The Court rejected the respondent's argument, holding that: (1) the right to enforce the liability provision was part of the petitioner's contract which fully vested before the repeal and was therefore protected by both the Contract Clause and due process; and (2) the reserved power of a state over corporations and their shareholders cannot be used to destroy the vested rights of third persons or to impair the obligations of their contracts. *Coombes*, 285 U.S. at 441-42. The Court explained that when a right arises upon contract and is so far perfected that nothing remains to be done by the party asserting it, the contractual right is vested and cannot be defeated by subsequent legislation under the Contract Clause. *Id.* at 443-45.

(9th Cir. 1983) ("A promise in a contract that gives one party the power to deny or change the effect of the promise, is an absurdity.") (internal quotation marks and citations omitted).

Here, Petitioner continues to ignore these binding precedents and to advocate for such an "absurdity." Rather than face its heightened burden of justification for enacting Ordinance 05-001 and impairing Respondents' Contracts, Petitioner simply repeats the mantra that its power of eminent domain is absolutely protected from judicial review by the reserved powers doctrine. In raising this anti-judicial shield, Petitioner misconstrues the reserved powers doctrine and fails to explain how it excuses Petitioner's impairment of the Contracts. Furthermore, Petitioner request that the Court use an anomalous and unprecedented application of the reserved powers doctrine – a common law creation – to nullify a constitutional provision. Such an unprecedented dismantling of "the Supreme Law of the Land", U.S. CONST., art. VI, cl. 2, is untenable. *See Philadelphia Newspapers, Inc. et al. v. Hepps et al.*, 475 U.S. 767, 775 (1986) (holding that the United States "Constitution . . . supplants the standards of the common law"); *Int'l Aircraft Recovery, L.L.C. v. The Unidentified, Wrecked and Abandoned Aircraft*, 218 F.3d 1255, 1260 (11th Cir. 2000) (rejecting the argument that the common law of admiralty superseded the Property Clause of the United States Constitution).

None of Petitioner's cited cases support its claim that the reserved powers doctrine operates to permit

it to avoid its contractual obligations. Indeed, *U.S. Trust* and *Winstar* undermine it. In *U.S. Trust*, the Court traces the history of the reserved powers doctrine and in that context cites a number of 19th and early 20th Century cases holding that the state cannot contract away its police power and its power of eminent domain. *See U.S. Trust*, 431 U.S. at 23-24 (citing *West River Bridge v. Dix*, 47 U.S. 507 (1848), *Contributors to Pennsylvania Hosp. v. City of Philadelphia*, 245 U.S. 20 (1917) and others); *accord Winstar*, 116 S. Ct. 2432 at 874 (citing *West River Bridge* and others). But the Court goes on to state that "such formalistic distinctions perhaps cannot be dispositive" and proceeds to set out a heightened scrutiny test for evaluating state legislation that impairs contractual relations, *even where the state purports to exercise its police powers*. *See U.S. Trust*, 431 U.S. at 22 (contracts "are not subject to unlimited modification under the police power"); *Allied Steel*, 438 U.S. at 235 (the Contract Clause limits the state's power to impair contracts, "even in the exercise of its otherwise legitimate police power").

Thus, in the wake of *U.S. Trust*, categorical distinctions that except the traditional reserved powers (of police and eminent domain) from Contract Clause scrutiny are plainly improper as a matter of law. That is the fundamental flaw in Petitioner's analysis here; Petitioner does nothing more than categorize the enactment of Ordinance 05-001 as a legitimate exercise of the power of eminent domain and discredits any further inquiry. At a minimum,

Petitioner's highly deferential analysis conflicts with the scrutinizing analysis required in *U.S. Trust* and its progeny.

To the extent that *U.S. Trust* leaves room for a narrow category of reserved powers that the state cannot surrender, Petitioner's purported power to repeal Chapter 38 to repudiate the Contracts does not fall within that category. As a threshold matter, it is doubtful that the repeal of Chapter 38 and the destruction of Respondents' contract rights even constitute an exercise of Petitioner's eminent domain power. Respondents have vested contract rights.[12] *See Coombes*, 285 U.S. at 434, and *supra*, note 11. Petitioner's exercise of its eminent domain power in this context would have required that Respondents be paid just compensation. *See U.S. Trust*, 431 U.S. at 19, n.16 ("[c]ontract rights are a form of property and as such may be taken for a public purpose provided

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[12] Vested contract claims rise to the level of a constitutionally protected property interest. *See Lynch v. United States*, 292 U.S. 571, 579 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States."); *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933); *Pritchard v. Norton*, 106 U.S. 124, 132 (1882) ("[A] vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away."). A claim based on a contract vests at the time of a breach. *Gibbes*, 290 U.S. at 332; *Pritchard*, 106 at 132-33. Here, Respondents have vested contract claims that constitute property protected by the United States Constitution.

that just compensation is paid"). But Respondents received nothing from Petitioner except frustrating delay and broken promises.

III. The Ninth Circuit's Distinction Between Contracts Requiring a Government's Exercise of Eminent Domain and Those Restricting It Is Not Illusory

The reserved powers doctrine cannot apply because the legislative act at issue – the repeal of Chapter 38 – in no way limits, much less surrenders or "contracts away," Petitioner's power of eminent domain. Similarly, the Contracts themselves do not surrender this power. In this respect and contrary to Petitioner's suggestion, the Contracts bear absolutely no resemblance to the contract in *Contributors to Pennsylvania Hosp.*, which concerned a state law forbidding indefinitely the opening of any street through hospital grounds.[13] Rather, Respondents' Contracts simply require Petitioner to take certain discrete steps in the here and now to satisfy its specific promises to Respondents. If anything, it is Ordinance 05-001, not Lessees' Contracts, that limits

[13] The Ninth Circuit's Opinion correctly noted that there is no provision in the Contracts that purports to prevent Petitioner from conveying the property to Respondents and later taking the property for public use. Thus, the Contracts contain none of the same elements the Court found unenforceable in *Contributors to Pennsylvania Hosp.* *See* Pet. App., at p. 14a.

Petitioner's power of eminent domain by repealing its right to condemn leased fee interests.

And while it is true that Petitioner cannot agree to surrender its condemnation powers, the converse is not correct: there is nothing that forbids Petitioner from being held to a contract-based commitment to exercise this power. Thus, no authority supports Petitioner's blanket assertion that "[a] legislative body cannot be bound by an agreement to affirmatively use its eminent domain power." Petition, at 23. *See also* Petition, at 28. This conspicuous absence of authority is not surprising given the breathtaking implications of Petitioner's argument taken to the extreme, *i.e.*, that all of the Petitioner's Chapter 38 leasehold conversion contracts entered into since 1991 are null and void, and all resulting leasehold conversions were illegal. Of course, the Contracts do in effect prevent Petitioner from repealing Chapter 38 in such a way as to pull the rug out from under Respondents, but this is not the kind of future "limitation" on the power of eminent domain that any court has ever identified as a "reserved power." *See So. California Gas*, 336 F.3d at 893 (reservation of rights in public contract did not allow city to adopt ordinances to compromise its material terms); *Cont'l Illinois Nat'l Bank*, 696 F.2d at 698-99 (reading a statutory and purported reserved powers provision as applicable to prospective arrangements, but "not to modify pre-existing contracts"). *Cf. Winstar*, 116 S. Ct. at 881 (enforcement of government contracts with financial institutions permitting them to use special

accounting methods for their acquisitions of failing thrifts did not bind government's exercise of authority to modify banking regulation or other sovereign power).

Many of Petitioner's cited cases stand for the noncontroversial proposition that a government may not enter into a contract that surrenders its power of eminent domain.[14] These holdings are irrelevant to the issues presented in the Petition. Here, the legislative act in question – the repeal of Chapter 38 – in no way limits Petitioner's power of eminent domain. Nor do the Contracts themselves surrender or otherwise

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[14] *See* Petition, at pp. 22-24 (citing in the following order, *State of Georgia v. City of Chattanooga*, 264 U.S. 472, 480 (1923) (holding that city's power to take land for street purposes is not impaired by the fact that State of Georgia owned land in Tennessee used for railroad purposes, and Georgia cannot claim sovereign immunity or privilege); *West River Bridge v. Dix*, 47 U.S. 507 (1948) (upholding court's order that toll bridge be taken for public use on payment of $4,000 even though State of Vermont awarded 100 year franchise to build and operate bridge some 48 years earlier); *City of Milwaukee v. Schomberg*, 52 N.W.2d 151, 152 (Wis. 1952) (holding that city was not prevented from condemning and taking defendants' land for street purposes by reason of a provision in the city's grant of easement to defendants providing that city would not open a street through any of the property under grant without defendants' consent); *City of Corpus Christi v. Taylor*, 126 S.W.2d 712, 719 (Tex. Ct. App. 2004) (holding that covenant in deed, by and between city as grantor and defendants, that city "shall never file or prosecute any suit to condemn" property was unenforceable because city could not enter into a contractual provision which limits its free exercise of governmental and police powers).

limit that power.[15] Rather the Contracts merely require Petitioner to take certain discrete and immediate steps to satisfy its contractual obligations to Respondents.

Many of the reserved powers doctrine cases cited by Petitioner do not address the Contracts Clause or a government's legislative act as an impairment of contract at all.[16] For this reason, Petitioner's reliance on *Western Union Tel. Co. v. Louisville & N.R. Co.*, 258 U.S. 13 (1922), is misplaced. *See* Petition, at 24. Petitioner fails to mention that *Western Union* did not involve the Contract Clause or constitutional claims of impairment of contract. Rather, *Western Union*

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[15] It is noteworthy that all of Petitioner's cited cases that actually concern contracts address contracts that effectively forbade the government from using its power of eminent domain. *See* Petition, at pp. 22-23, 30-31 (citing *Schomberg*, 52 N.W. 2d at 152 (addressing provision in grant of easement that forbade city from condemning property under grant for street purposes); *Taylor*, 126 S.W.2d at 719 (addressing covenant in deed that city "shall never file or prosecute any suit to condemn" property under deed); *Contributors to Pennsylvania Hosp.*, 245 U.S. at 23 (addressing statutory contract between city and hospital that forbade the city from opening of any streets or alleys through the subject property)).

[16] *See* Petition's reference, at pp. 22-23, to *City of Chattanooga*, 264 U.S. at 480 (case does not concern legislative act that allegedly constitutes an unconstitutional impairment of contract; rather case addresses a city's commencement of judicial proceeding to condemn property), *Taylor*, 126 S.W.2d at 719 (case does not present constitutional issue of impairment), and *Schomberg*, 52 N.W.2d at 152 (case addressed a city's commencement of judicial proceeding to condemn property).

concerned a telegraph company's claims of vested rights and interference with judicial proceedings. Furthermore, the Court's *Western Union* opinion was issued in 1922, more than fifty years before the Court's adoption of the heightened scrutiny public contract test in *U.S. Trust*. These factors render *Western Union* completely inapplicable to this case.

Petitioner cites to *U.S. Trust* to support its erroneous claim that the reserved powers doctrine excuses its impairment of the Contracts and supplants any judicial analysis under the heightened scrutiny public contract test. *See* Petition, at pp. 20-21, 31-32. Neither *U.S. Trust* nor any other case made such a finding. Rather, *U.S. Trust* and its progeny make clear that the reserved powers doctrine is not an exception to, or substitution for, Contract Clause analysis under *U.S. Trust*. In a public contract case, even when the exercise of the police or eminent domain powers are at issue, the heightened scrutiny test must still be applied. *See, e.g., Energy Reserves*, 459 U.S. at 412; *Rui One*, 371 F.3d at 1147; *So. California Gas*, 336 F.3d at 893; *Cayetano*, 183 F.3d at 1107.

IV. Petitioner's Claim That the Council's Legislative Discretion Is Absolute Conflicts With This Court's Decisions

Petitioner's repeated pronouncements that this Court must defer to the Council's determinations on issues of public purpose and eminent domain are

clearly not the law. *See* Petition, at pp. 28-30. Taken to their extreme, the Petitioner's sweeping statements of legislative power would allow it to use its police and eminent domain powers to punish or otherwise discriminate against its political opponents with impunity.

It is axiomatic that a legislature's acts are subject to judicial review for their constitutionality. *See Marbury v. Madison*, 5 U.S. 137 (1803). In this context, assessment of legislative purpose is hardly a forbidden role of the judiciary; indeed, it is a duty that the courts regularly perform in adjudicating a variety of constitutional claims. *See, e.g., Maine v. Taylor*, 477 U.S. 131, 138 (1986) (local law that discriminates against interstate commerce valid only if it serves a "legitimate local purpose" that could not be served by available alternatives); *Cent. Hudson Gas v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) (regulation on commercial speech valid only if it "directly advances" a "substantial" government purpose and is narrowly tailored to serve that purpose); *Craig v. Boren*, 429 U.S. 190 (1976) (legislative classification based on gender invalid unless it is "substantially related" to an "important" government purpose). Legislative purpose is similarly subject to judicial scrutiny under the Contract Clause. *See U.S. Trust*, 431 U.S. at 23-25. *See also Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978) ("[T]he Contract Clause remains part of the Constitution. It is not a dead letter.").

These basic tenets of judicial review cannot be brushed aside by blanket reliance on the common law reserved powers doctrine. The enactment of Ordinance 05-001 is *precisely* the type of legislative impairment of contract that the Contract Clause was designed to prevent.[17] Under the *U.S. Trust* line of cases, assessing the legitimacy and necessity of Petitioner's purported purpose in enacting Ordinance 05-001 is precisely the Court's duty in adjudicating Respondents' constitutional claims. *See Energy Resources*, 459 U.S. at 412. The Court can no more ignore this duty under the Contract Clause than it can

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[17] The Contract Clause was created to guard against a vast "array of state legislative schemes" plaguing the early Republic, aimed at defeating contractual obligations. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934).

> 'The power of . . . interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. This mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil, was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government.'

Blaisdell, 290 U.S. at 428 (quoting *Ogden v. Saunders*, 25 U.S. 213, 254-55 (1827) (Marshall, C.J.)).

under the Equal Protection or Due Process Clauses. Nor can Petitioner ignore the Contract Clause or any *other constitutional provision* simply because it views the provision – or accompanying judicial review – as a threat to its legislative discretion.

The governing case law makes clear that blind deference to the Council's purported purpose in enacting Ordinance 05-001 is wholly improper. As stated by Justice Blackmun, and contrary to Petitioner's argument:

> [C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. . . . If a State could reduce its . . . obligations whenever it wanted to . . . for what it regarded as an important public purpose, the Contract Clause would provide no protection at all. . . . [A] State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives.

U.S. Trust, 431 U.S. at 26, 30-31.

Similarly, the Ninth Circuit has recognized:

> A higher level of scrutiny is required to assess abrogations of government obligations than in the case of legislative interference with the contract of private parties. . . . Accordingly, [courts] are less deferential to a state's judgment of reasonableness and necessity when a state's legislation is self-serving and impairs the obligations of its own contracts.

Cayetano, 183 F.3d at 1107 (holding State did not establish law was both necessary and reasonable) (internal quotation marks and citation omitted). That heightened level of scrutiny is necessary here, where Petitioner's enactment of Ordinance 05-001 impaired its obligations, and extinguished Respondents' rights, under the Contracts.

V. There Is No Reason for This Court to Consider Whether Petitioner Can Be Contractually Bound by the Contracts After Chapter 38's Repeal

"'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'" *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970)). Petitioner's second question for review – that it cannot be contractually bound by the Contracts after Chapter 38's repeal, *see* Petition, at p. i – was not raised by Petitioner before the Ninth Circuit or the District Court, nor considered or decided by those courts. *See* Pet. App., at pp. 1a-19a, 24a-52a.[18] The Petition contains no discussion or

[18] In fact, the only issued addressed by the Ninth Circuit was "whether the United States Constitution imposes any limit on the [Petitioner's] power to repudiate a contract to convey property to a private citizen in connection with its leasehold conversion program." Ninth Circuit's Opinion, set forth in Pet. App., at p. 3a.

argument on this issue. Further, this Court's opinion in *Coombes* answers Petitioner's second question in the negative. *See Coombes*, *supra*, note 11. Petitioner's disingenuous effort by its second "question" to persuade the Court that there are compelling reasons to grant the Petition is wholly unsupported, and should not be considered by this Court. *See Yeskey*, 524 U.S. at 212-13; *Adickes*, 398 U.S. at 147, n.2.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, for the foregoing reasons, Respondents respectfully request that this Court deny the Petition.

Respectfully submitted,

DAVID A. NAKASHIMA
Counsel of Record
CLYDE J. WADSWORTH
LERISA L. HEROLDT
ALSTON HUNT FLOYD & ING
American Savings Bank Tower
1001 Bishop Street, 18th Floor
Honolulu, Hawai'i 96813
Telephone: (808) 524-1800

Counsel for Respondents

APPENDIX 1

CITY AND COUNTY OF HONOLULU
STATE OF HAWAII

RULES FOR RESIDENTIAL CONDOMINIUM, COOPERATIVE AND PLANNED DEVELOPMENT LEASEHOLD CONVERSION

CHAPTER 1	RULES OF GENERAL APPLICATION
§1-1	Applicability
§1-2	Definitions
§1-3	Severability
§1-4	Authority of the department
§1-5	Investigations
§1-6	Collection of information
§1-7	Dissemination of information
§1-8	Contracts, documents, deeds
§1-9	Burden of proof; oaths, affidavits
§1-10	Revolving fund
CHAPTER 2	LEASEHOLD CONDOMINIUMS
SUBCHAPTER 1	PURPOSE; APPLICABILITY
§2-1	Purpose
§2-2	Applicability

SUBCHAPTER 2 APPLICATION; FINDING; NEGOTIATIONS

§2-3 Application by lessees

§2-4 Qualifications for purchase

§2-5 Review of applications; preliminary approval

§2-6 Public notice; public hearing

§2-7 Finding of Effectuation of public purpose

§2-8 Negotiation by fees owners and preliminarily approved applicants

§2-9 Estimated costs

§2-10 Initial deposit; final approval of applicants

SUBCHAPTER 3 DESIGNATION; CONDEMNATION; WITHDRAWAL; SUBSTITUTION

§2-11 Designation

§2-12 Condemnation

§2-13 Withdrawal

§2-14 Substitution

SUBCHAPTER 4 ADDITIONAL DEPOSITS; SUBSEQUENT APPLICANTS

§2-15 Additional deposits

§2-16 Subsequent applicants

* * *

§2-12 *Condemnation.* Following the designation by the director of the individual residential condominium interests, the director shall request the corporation counsel to prepare and present to the City Council a Resolution for the exercise of the power of eminent domain for the condemnation of the legal and equitable interests of the fee owner, lessor, or equitable owner of the leased fee interest, and may request the appropriation of the funds necessary to pay the compensation for the leased fee interest. He director shall also request the corporation counsel to file the necessary legal action no later than 12 months after the designation. If some of the applicants have reached an agreement with the fee owners, the Resolution and condemnation action shall relate only to the remaining applicants who have not reached an agreement. [Eff 10/9/93; am and ren §2-12 DEC 22 2000] (Auth. ROH §38-1.8(a),(i)) (Imp: ROH §38-5.2; RCH §§3-110; 3-202)

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APPENDIX 2

HAWAII REVISED STATUTES

TITLE 9. PUBLIC PROPERTY, PURCHASING AND CONTRACTING

CHAPTER	
101	EMINENT DOMAIN
102	CONCESSIONS ON PUBLIC PROPERTY
103	EXPENDITURE OF PUBLIC MONEY AND PUBLIC CONTRACTS
103D	HAWAII PUBLIC PROCUREMENT CODE
104	WAGES AND HOURS OF EMPLOYEES ON PUBLIC WORKS
105	GOVERNMENT MOTOR VEHICLES
106	INVENTORY, ACCOUNTING, AND DISPOSAL OF GOVERNMENT ASSETS
107	PUBLIC IMPROVEMENTS
109	STADIUMS
110	STATE-OWNED CEMETERIES
111	ASSISTANCE TO DISPLACED PERSONS
113	LAND ACQUISITION POLICIES FOR FEDERALLY ASSISTED PROGRAMS
115	PUBLIC ACCESS TO COASTAL AND INLAND RECREATIONAL AREAS

CHAPTER 101 EMINENT DOMAIN

PART I. CONDEMNATION OF PRIVATE PROPERTY

SECTION

101-1	DEFINITIONS
101-2	TAKING PRIVATE PROPERTY FOR PUBLIC USE; DISPOSAL OF EXCESS PROPERTY
101-3	ENTRY UPON PRIVATE PROPERTY BY AGREEMENT
101-3.5	PRIORITY FOR LESSEES DISLOCATED BY CONDEMNATION PROCEEDINGS
101-4	RIGHT OF EMINENT DOMAIN GRANTED TO PUBLIC UTILITIES AND OTHERS
101-5	FEE SIMPLE OR LESSER ESTATE MAY BE ACQUIRED
101-6	WHAT PROPERTY MAY BE TAKEN
101-7	SUPERIOR PUBLIC USE
101-8	ENTERING AND SURVEYING LAND
101-9	ACTIONS; PRIORITY
101-10	CIRCUIT COURTS HAVE JURISDICTION
101-11	PROCEDURE AS IN CIVIL ACTIONS
101-12	EVIDENCE
101-13	EXERCISE OF POWER BY COUNTY
101-14	PLAINTIFF
101-15	COMPLAINT;DEFENDANTS
101-16	COMPLAINT; ADDITIONAL CONTENTS; MAP
101-17	DIFFERENT PROPERTIES IN ONE ACTION
101-18	JOINT OR CONSOLIDATED ACTIONS BY GOVERNMENTAL AGENCIES
101-19	AMENDMENTS OF COMPLAINTS, CITATIONS
101-20	NOTICE

101-21	INTERVENORS
101-22	DECISION
101-23	DAMAGES ASSESSED, HOW
101-24	ASSESSED AS OF DAY OF SUMMONS
101-25	PAYMENT OF JUDGMENT, PENALTIES
101-26	FINAL ORDER OF CONDEMNATION
101-27	DEFENDANT ALLOWED DAMAGES UPON ABANDONMENT OR DISMISSAL OF PROCEEDINGS
101-28	POSSESSION PENDING ACTION; IMMEDIATE OCCUPATION BY PLAINTIFF
101-29	POSSESSION PENDING ACTION; ALTERNATIVE PROCEDURE
101-30	ORDER OF POSSESSION
101-31	PAYMENT OF ESTIMATED COMPENSATION; EFFECT THEREOF

* * *

§101-13 Exercise of power by county. Whenever any county deems it advisable or necessary to exercise the right of eminent domain in the furtherance of any governmental power, the proceedings may be instituted as provided in section 101-14 after the governing authority (county council, or other governing board in the case of an independent board having control of its own funds) of the county has authorized such suit by resolution duly passed, or adopted and approved, as the case may be. The resolution, in the case of the city and county of Honolulu or an independent board thereof, shall, after its introduction, be published in a daily newspaper with the ayes and noes, once (Sundays and legal holidays excepted) at

least three days before final action upon it, and in the case of any other county or an independent board thereof, be published in a newspaper with the ayes and noes, at least one day (Sundays and legal holidays excepted), before final action upon it. [L 1919, c 63, §1; am L 1923, c 48, §1; RL 1925, §815; am imp L 1933, c 98, §2; RL 1935, §57; RL 1945, §308; am L 1951, c 12, §1(h); RL 1955, §8-11; HRS §101-13]

§101-14 Plaintiff. The attorney general of the State may, at the request of the head of any department of the State, or as otherwise provided by law, institute proceedings for the condemnation of property as provided for in this part. Any county may institute proceedings in the name and on behalf of the county for the condemnation of property within the county for any of the purposes provided in this part which are within the powers granted to the county. [L 1896. c 45, §4; am L 1917, c 108, §2; RL 1925, §816; RL 1935, §58; RL 1945, §309; am L 1947, c 200, §1(b); am L 1951, c 12, §1(i); RL 1955, §8-12; HRS §101-14]

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APPENDIX 3

REVISED ORDINANCES OF HONOLULU

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Sec. 2-3.2 Prohibited acts.

The corporation counsel shall not:

(a) Initiate, engage or participate in any legal action or proceedings in which the city, its officials and/or employees are not directly involved in or named as a party to a contemplated or ongoing legal proceeding.

(b) Other than situations where corporation counsel is expressly authorized by federal or state statutes or city laws, bring action against a private person as defined in Section 1-4.1 without first obtaining the consent and approval of the city council which shall be manifested by an adopted council resolution.

(Sec. 2-3.2, R.O. 1978 (1983 Ed.); Am. Ord. 96-58)

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